

1 BEFORE THE WESTERN WASHINGTON GROWTH MANAGEMENT HEARINGS BOARD

2 ABENROTH, et al.,

3 Petitioners,

4 v.

5 SKAGIT COUNTY,

6 Respondent,

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9 SKAGIT COUNTY GROWTHWATCH,  
10 CITIZENS TO PROTECT BAY VIEW RIDGE,  
11 AND GERALD STEEL,

12 Petitioners,

13 v.

14 SKAGIT COUNTY,

15 Respondent,

16 And

17 BOUSLOG INVESTMENTS, L.L.C., JBK  
18 INVESTMENTS, L.L.C., and JOHN  
19 BOUSLOG,

20 Intervenor.

Case No. 97-2-0060c

ORDER DENYING MOTION FOR  
RECONSIDERATION

CASE NO. 07-2-0002

ORDER DENYING MOTION FOR  
RECONSIDERATION

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23 This Matter comes to the Board on Skagit County's Motion for Reconsideration filed with the  
24 Board on January 2, 2009. In that motion the County alleges the Board committed an  
25 error of procedure or misinterpretation of fact or law in finding the County has still not  
26 complied with RCW 36.70A.070(3)(b) and(c) because it had not completed an assessment  
27 of park needs and identified future park facilities to meet those needs. The County claims  
28 the Board erred in making this finding because Petitioners had not objected to a finding of  
29 compliance. This Order denies that motion for reconsideration.  
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## RELEVANT PROCEDURAL HISTORY

On December 23, 2008, the Board issued a Compliance Order in the above captioned cases. This Order found that the County had complied with all the issues on which the Board's August 6, 2007 Compliance Order/Final Decision and Order (Order) had found noncompliance, except one. The exception was the failure of the Bayview Ridge Urban Growth Area's (UGA) Capital Facilities Plan (CFP) for parks to include an assessment of park needs based on the County's new Parks Level of Service standards or proposed locations and capacities of those facilities to meet the UGA's park needs. On January 2, 2009, Skagit County filed a Motion for Reconsideration on the grounds that Petitioners had not objected to a finding of compliance for that issue so the Board was barred from finding noncompliance.

## DISCUSSION

A motion for reconsideration of a final decision of a Board is governed by WAC 242-02-832. It provides, at WAC 242-02-832(2), that a motion for reconsideration must be based on at least one of the following grounds:

- (a) Errors of procedure or misinterpretation of fact or law, material to the party seeking reconsideration;
- (b) Irregularity in the hearing before the board by which such party was prevented from having a fair hearing; or
- (c) Clerical mistakes in the final decision and order.

Motions for Reconsideration will be denied when they present no new arguments that were not previously considered in the original decision.<sup>1</sup>

Skagit County bases its Motion for Reconsideration on an alleged misinterpretation of fact or law (WAC 242-02-832(2)(a)).

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<sup>1</sup> *CCNRC v. Clark County*, WWGMHB No. 96-2-0017 (Order on Reconsideration, Jan. 21, 1998)

1 The County argues that the Board lacks authority to issue an order of noncompliance  
2 relating to parks for the following reasons: (1) the Petitioners failed to raise the issue before  
3 the Board or present evidence at the compliance hearing to overcome the presumption of  
4 validity that attaches to the County's legislative action pursuant to RCW 36.70A.320(1); (2)  
5 the Board acknowledged this in the December 23, 2008 Compliance Orders; and (3) other  
6 Western and Central Puget Sound Hearings Boards' cases support this interpretation.<sup>2</sup> The  
7 County maintains that it does not need to affirmatively prove to the reviewing body that its  
8 actions taken in response to a Board order are compliant, and that the burden of proof  
9 remains with the Petitioner.<sup>3</sup>  
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12 The following sections of the GMA apply to this decision: RCW 36.70A.300(3)(b) states,

13 (3) In the final order, the board shall either: ... (b) Find that the state agency,  
14 county, or city is not in compliance with the requirements of this chapter, chapter  
15 90.58 RCW as it relates to the adoption or amendment of shoreline master  
16 programs, or chapter 43.21C RCW as it relates to adoption of plans,  
17 development regulations, and amendments thereto, under RCW 36.70A.040 or  
18 chapter 90.58 RCW, in which case the board shall remand the matter to the  
19 affected state agency, county, or city. The board shall specify a reasonable time  
20 not in excess of one hundred eighty days, or such longer period as determined  
21 by the board in cases of unusual scope or complexity, within which the state  
22 agency, county, or city *shall* comply with the requirements of this chapter.  
(emphasis added)

23 RCW 36.70A.330(1) and (2) states (in pertinent part),

24 (1) After the time set for complying with the requirements of this chapter under  
25 RCW 36.70A.300(3)(b) has expired, or at an earlier time upon the motion of a  
26 county or city subject to a determination of invalidity under RCW 36.70A.300, the  
27 board shall set a hearing for the purpose of determining whether the state  
28 agency, county, or city is in compliance with the requirements of this chapter.

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30 <sup>2</sup> Skagit County's Motion for Reconsideration at 3 and 4. Cases referenced include *ICCGMC v. Island*  
31 *County*, WWGMHB Case No. 98-2-23c (Compliance Order, March 6, 2000), *Abenroth v. Skagit County*,  
32 WWGMHB 97-2-0060c (Final Decision and Order, January 23, 1998), *Seattle-King County Association of*  
*Realtors v. King County*, CPSGMHB 04-2-0038 (Final Decision and Order, May 31, 2005), and *City of*  
*Shoreline v. City of Woodway*, CPSGMHB, 00-3-0001 pdr (Order Declining to Issue a Declaratory Ruling,  
February 22, 2001).

<sup>3</sup> Id at 4.

1 (2) The board shall conduct a hearing and issue a finding of compliance or  
2 noncompliance with the requirements of this chapter and with any compliance  
3 schedule established by the board in its final order. A person with standing to  
4 challenge the legislation enacted in response to the board's final order may  
5 participate in the hearing along with the petitioner and the state agency, county,  
6 or city.

6 RCW 36.70A.320(1) and (2) state (in pertinent part)

7 (1) Except as provided in subsection (5) of this section, comprehensive plans and  
8 development regulations, and amendments thereto, adopted under this chapter  
9 are presumed valid upon adoption.

10 (2) Except as otherwise provided in subsection (4) of this section, the burden is  
11 on the petitioner to demonstrate that any action taken by a state agency, county,  
12 or city under this chapter is not in compliance with the requirements of this  
13 chapter.

14 In this case, Petitioners raised the issue that the County's capital facilities plan for park  
15 facilities did not comply with RCW 36.70A.070 (b) and (c) in its Petition for Review. The  
16 Board found in its August 6, 2007 Order that Petitioners had carried their burden of proof to  
17 show that neither the Bayview Ridge Subarea nor the County's CFP included an  
18 assessment of park needs or proposed locations and future capacities for park facilities, and  
19 therefore did not comply with RCW 36.70A.070(3)(b) and (c).<sup>4</sup> This finding of  
20 noncompliance was among approximately twelve issues where the Board found  
21 noncompliance.  
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23 RCW 36.70A.300(3)(b) is explicit. It requires Skagit County to comply with the GMA in  
24 areas where the Board's August 6, 2007 Order found noncompliance.  
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26 On August 11, 2008 Skagit County submitted a compliance report detailing the actions that  
27 it had taken action to comply with the Board's August 6, 2007 Order. The Board took its  
28 responsibility authorized by RCW 36.70A.300(3)(b) seriously and reviewed the County's  
29 actions for compliance with the GMA.<sup>5</sup> This review, as set out in the December 23, 2008  
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<sup>4</sup> Compliance Order/Final Decision and Order at 7 and 26.

<sup>5</sup> Compliance Order at 6-18.

1 Compliance Order, found that the County had complied with all of the issues on which the  
2 Board's August 6, 2007 Compliance Order/Final Decision Order had determined were  
3 noncompliant, but one. That issue is the following:

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5 The County has made a financial commitment to reassess Bayview Ridge UGA's  
6 park needs sizes and location, but has not established park facility needs based  
7 on its new LOS or proposed locations and capacities of future facilities . Thus,  
8 the Board finds the County has not achieved compliance with RCW  
36.70A.070(b) and (c).<sup>6</sup>

9 The issue in compliance proceedings is somewhat different than it is during an original  
10 adoption. In compliance proceedings, the Board has identified an area of the local  
11 jurisdiction's comprehensive plan or development regulations that do not comply with the  
12 GMA. The local jurisdiction is under an obligation to bring those areas into compliance and  
13 demonstrate that fact to the Board<sup>7</sup>. While the ordinance that is adopted to cure non-  
14 compliance is entitled to a presumption of validity, nevertheless, the local jurisdiction must  
15 still demonstrate to the Board that it has addressed the area of non-compliance identified in  
16 the FDO. A mere lack of objection by the petitioner does not demonstrate that the non-  
17 compliant provision has been cured. Any finding or conclusion in prior decisions of the  
18 Board to the contrary are overruled.  
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21 The County's Compliance Report showed that the County had not taken action to assess its  
22 parks needs and identify future locations and capacities of park facilities. Nor did the  
23 County claim that it had taken that action. Therefore, the Board concluded that the County  
24 had not taken any action to bring its CFP for the Bayview Ridge UGA into compliance with  
25 RCW 36.70A.070 (b) and (c) for park facilities as required by RCW 36.70A.300(3)(b). Even  
26 though Petitioners did not point out that the County had not taken action to comply pursuant  
27 to RCW 36.70A.300(3)(b), it does not relieve the County of its responsibility to comply with  
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<sup>6</sup> Compliance Order at 10. Also see Conclusion of Law G at 31.

<sup>7</sup> RCW 36.70A.300(3)(b)

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1 the requirements of the Growth Management Act or the Board of its responsibility to  
2 determine compliance pursuant to RCW 36.70A.330(1) and (2).

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4 Of the cases cited by the County, only the March 6, 2000 Compliance Order in *ICCGMC v.*  
5 *Island County*, WWGMHB Case No. 98-2-0023 is analogous to the situation here. In  
6 *ICCGMC v. Island County* the County took action, which the Board did not review due to  
7 lack of Petitioner's objections. In this case, the County took no action to comply with the  
8 Board's order. The majority of the other cases cited by the County are Final Decisions and  
9 Orders where Petitioners did not raise the issue in a petition for review. The Central Puget  
10 Sound's February 22, 2001 Order Declining to Issue a Declaratory Ruling in *City of*  
11 *Shoreline v. City of Woodway*, CPSGMHB, 00-3-0001pdr was in response to a request for a  
12 declaratory ruling where the issue had not been raised in petition for review and is therefore  
13 distinguishable on that basis.  
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16 **Conclusion:** The County has not taken action to comply with the GMA in regard to  
17 identifying park needs and locations and capacities of park facilities to meet these needs.  
18 Therefore, the County remains out of compliance with RCW 36.70A.070(3)(b) and (c) with  
19 regard to park facilities for the Bayview Ridge UGA. The Board concludes that it did not  
20 make an error of procedure or misinterpretation of fact or law, material to the party seeking  
21 reconsideration. Therefore, the County's Motion for Reconsideration is DENIED.  
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### 23 ORDER

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25 The County's Motion for Reconsideration is DENIED.

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27 Entered this 21st day of January 2009.

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Holly Gadbow, Board Member

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James McNamara, Board Member  
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William Roehl, Board Member

Pursuant to RCW 36.70A.300 this is a final order of the Board.

**Judicial Review.** Any party aggrieved by a final decision of the Board may appeal the decision to superior court as provided by RCW 36.70A.300(5). Proceedings for judicial review may be instituted by filing a petition in superior court according to the procedures specified in chapter 34.05 RCW, Part V, Judicial Review and Civil Enforcement. The petition for judicial review of this Order shall be filed with the appropriate court and served on the Board, the Office of the Attorney General, and all parties within thirty days after service of the final order, as provided in RCW 34.05.542. Service on the Board may be accomplished in person or by mail, but service on the Board means actual receipt of the document at the Board office within thirty days after service of the final order. A petition for judicial review may not be served on the Board by fax or by electronic mail.

**Service.** This Order was served on you the day it was deposited in the United States mail. RCW 34.05.010(19)